United States Court of Appeals

for the Ninth Circuit.

ANTHONY FRISONE,

Appellant,

-vs-

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

APPELLANT'S OPENING BRIEF

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FILED
MAR 31 1959

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STATEMENT OF CASE

The indictment in this case, filed October 30, 1957, charged your appellant, Anthony Frisone, and his wife, Nora Mathis Frisone, collectively in six counts of commission of the crime of perjury (See Tr. of Rec. page 2 to 20), in violation of U. S. C. Title 18, Sec. 1621. The appellant's wife, Nora Mathis Frisone, was named a defendant and charged with perjury in count 1 and 2 of the indictment (See Tr. of Rec. page 3 to page 9).

Your appellant was named as a defendant in count 3, count 4, count 5 and count 6 of the indictment (See Tr. of Rec. page 9 to page 29).

On May 28, 1958 appellant's counsel made a motion for judgment of acquittal as to count 5 which motion was denied, (Tr. of Rec. page 26). On June 3, 1958, at the conclusion of the evidence, appellant's attorney renewed motions to strike count 5 for lack of evidence and also for a directed verdict of acquittal. The motions were denied, (Tr. of Rec. page 29).

Your appellant, Anthony Frisone, on June 4, 1958, was found guilty as to Count Five of the indictment (see transcript of record, page 32 and page 33) by a verdict of the jury.

All other counts in relation to both your appellant as well as to those against the co-defendant, his wife, have been finally disposed of (see transcript of record, page 26, page 32 and page 79).

Your appellant duly and within the time prescribed by law, June 11th, 1958, moved the trial court for a new trial, specifically calling the attention of the trial court to the grievous error herein complained of (see transcript of record, page 70 and page 71).

On June 30th, 1958, after argument, the motion for a new trial was denied (see transcript of record, page 71).

On June 30, 1958, judgment was pronounced upon your appellant and he was committed to the custody of the Attorney General for imprisonment for 18 months (see tran-

script of record, page 78 and page 80).

Your appellant on July 2, 1958, duly filed notice of his appeal to this Honorable Court, (see transcript of record, page 80).

STATEMENT OF FACTS

On the 26th day of March, 1957, a jury trial of your now appellant was commenced in the United States District Court at Los Angeles, before District Judge Ernest A. Tolin (see transcript of record, page 2). The indictment on which that trial was predicated was an asserted violation of Title 18, Section 2421 of the United States Code. In substance, it was there charged that on or about December 27, 1954, Anthony Frisone was guilty of transporting Nora Mathis Frisone, a woman, in foreign commerce for purposes of prostitution (see transcript of record, page 17 and page 18).

During the course of that trial, Anthony Frisone, your appellant, was duly sworn as a witness and gave testimony in his own behalf. (See transcript of record, page 9, page 16, page 17 and page 18). The pertinent portions of that testimony are as follows:

> "Q. Let me ask you this: At the time that this took place in December of 1954, did you know your present wife, Nora at that time?
>
> A. I had met her. I had seen her. I think I had met her. I had seen her.

Q. In December of 1954?

A. Somewhere about that time.

Q. And you would say then that around the first of the year of 1955 your acquaintance with her was casual?

A. No. After the first of the year of 1955 ____ I don't know what the ------- exactly date, but we started going out together.

Q. In mid-December of 1954, did you know your present wife at that time?

A. I was acquainted with her. I had seen her.

Q. Had you ever dated her at that time?

A. No.

Q. Had she ever been in your automobile at that time?

A. I loaned my car out to several people while I was working. I couldn't say whether she had been or had not been. I don't know who took------

Q. Had she been in it while you were with her?

A. No, not while__________"

The foregoing testimony given in Judge Tolin's court was made the basis of the Count Five of the indictment which accuses your appellant of the perjury.

***In the trial at bar before Judge Yankwich on the charge of perjury appellant was asked the following questions and made the following answers, in reference to his testimony given before Judge Ernest A. Tolin:

"Q. Now, you were asked the following questions, to which, Mr. Frisone, you gave the following answers:

Q. Let me ask you this: At the time that this took place in December of 1954, did you know your present wife, Nora, at that time?

A. I had met her. I had seen her. I think I had met her. I had seen her.

Q. In December of 1954.

A. Somewhere about that time.

Q. And would you say then that around the first of the year of 1955 your acquaintance with her was casual?

A. No, After the first of the year of 1955 --- I don't know what the ---- exactly the date, but we started going out together.

Did you give those answers?

A. Yes, I did.

Q. Now, you were asked these questions:

Q. In mid-December of 1954, did you know your present wife at that time?

A. I was acquainted with her. I had seen her.

Q. Had you ever dated her at that time?

A. No.

Q. Had she ever been in your automobile at that time?

A. I loaned my car out to several people while I was working. I couldn't say whether she had been or had not been. I don't know who took----

Q. Had she been in it while you were with her?

A. No, not while------"

Now, are those true answers, ****

Q. (By Mr. Cantillon): You recall all of those questions and answers that I just listed for you?

A. Yes, I recall them.

Q. Now, are the answers true?

A. At the time I gave those answers, I believe them to be true.

Q. Now, you know them to be otherwise at this time?

A. Yes, I know them to be otherwise at this time, for the simple reason that---well, in order to---there is a series of events that leads up to this****
(See Transcript of record, page 142 and page 143).

Q. (By Mr. Cantillon): Whom, other than myself, did you speak to, if you spoke to anyone else, concerning fixing a time for your meetings and becoming intimate with your present wife?

A. Well, I not only spoke to people, ---I spoke to my wife, I spoke to my brother, I read documents there were presented to me in the form of indictments and pretrial--I don't know the correct term for it--allegations, what the District Attorney was going to intend to prove, and different times and dates that he contended that I was somewhere, and we were in complete disagreement--my wife, and myself, and even my brother--so at your suggestion we hired---

The Court: Mrs. Edwards?**********
(See transcript of record, page 146)

Direct Examination

Q. (By Mr. Cantillon): Mr. Frisone, I'm going to ask you if you have ever suffered from any mental illness in the past.

Mr. Jensen: I'll object to that as being improper and immaterial and irrelevant, if the court please, and without more foundation---

The Court: I cannot see any bearing upon the

Mr. Cantillon: Well, I'm going to offer to prove, your Honor, that______

Mr. Jensen: If the court please---

Mr. Cantillon: ----he was treated in the Marine Corps.

The Court: No. We don't want to have any offer of proof. There is no plea of insanity here.

Mr. Cantillon: No, it's not based upon that. It's based upon the subject of an honest belief. Recollection: failure of recollection---

The Court: Well, I don't think failure of recollection is a defense on a plea of not guilty in the Federal courts.

Mr. Cantillon: The proposition of his--well, I think I have stated my point.

The Court: All right**********

(See transcript of record, page 168, and page 169)

FIRST ASSIGNMENT OF ERROR

The Court erred in ruling that failure of recollection is not a defense on a plea of not guilty in the Federal Courts to the charge of perjury.

ARGUMENT IN SUPPORT OF ASSIGNMENT OF ERROR

Your appellant by his testimony given in this case at bar admitted without equivocation that his testimony given during the prior trial in 1957 as to events ocurring back in the year of 1954 was in fact erroneous. It is apparent that the appellant sought to explain this error as an honest mistake resulting from confusion of recollection. Your appellant sought to establish that his ability to

recollect had been impaired by mental illness. The Trial Court ruled such evidence as offered was inadmissible. When counsel for appellant attempted to ellicit such testimony the trial judge ruled as follows:

> "The Court: No, we don't want to have any offer of proof. There is no plea of insanity here."

(See Tr. of Rec. page 169). Counsel for your appellant immediately stated the specific purpose for which the evidence was offered:

> "Mr. Cantillon: No, it's not based upon that. It's based upon the subject of an honest belief. Recollection; failure of recollection---"

The trial court squarely ruled that the evidence offered was not admissible and gave its reason for such a ruling:

> "The Court: Well, I don't think failure of recollection is a defense on a plea of not guilty in the Federal Court."

(See Tr. of Rec. page 169).

The quantum of proof that could have been adduced by appellant or its probative persuasiveness must under the rulings of the trial judge always remain unknown factors upon which this court may not speculate.

Count Five of the indictment charged perjury in violation of United States Code, Title 18, Section 1621, which reads as follows:

> "Whoever, having taken an oath before a competent

tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose or certify truly**** wilfuly and contrary to such oath states any material matter which he does not believe to be true, is guilty of perjury." (Emp. App.)

In U. S. vs. Remington, 191 Fed. (2) 246 at 250 the Appellate Court declared:

> "As already stated the essential issue in a perjury case is whether the accused's oath truly spoke his belief, all else is a contributory issue."

Evidence of appellant's mental illness could have been responsible for appellant's faulty recollection and accounted for an honest though erroneous recitation of past events when appellant was testifying.

Rule 26 - Evidence - Federal Rules of Criminal Procedure declare:

> "The admissibility of evidence and the competency, **** shall be governed, **** by the principles of the common law as they may be interpreted by the Courts of the United States in the light of reason and experience."

A review of the case hereafter cited establishes beyond peradventure that under this rule the evidence offered was admissible and competent and its refusal was prejudicial error.

In the case of U. S. vs. Maurice Rose, (3rd Circuit)

215 Fed (2) 617, the defendant was charged with having committed perjury before the Grand Jury. In a motion filed before trial the defendant asked for the right to inspect his entire testimony previously given before the Grand Jury assigning as his principal reason the fact that he was suffering from diabetes and heart ailment at the time he testified before said Grand Jury and as a result he suffered lapses of memory. This condition considered along with the voluminous character of his testimony made it impossible for him to recall all of such testimony. The defendant's motion was denied on the basis that the Grand Jury records are secret. The Appellate Court in the Rose case concluded the trial judge erred in denying the motion to inspect the Grand Jury records. An inspection of the Grand Jury records under the new rules of procedure is a discriminatory matter in the trial court and that in conformity with the precedent U. S. vs. Remington, (2, Cir.) 191 Fed. (2) 246, the trial judge should have allowed inspection. It was held that the trial court in this Rose case had abused its discretion.

The Appellate Court in so ruling, declared:

> "Furthermore, the rationale of the Remington case is especially applicable, when, as here, the defendant asserted that lapses of memory attributed to his physical condition made it difficult to recall his Grand Jury testimony for the purpose of preparing

his defense." (Emphasis Appellant's)

In the case of State vs. Coyne, 21 L.R.A. (NS) 993 at 997 the Supreme Court of Missouri, a question bearing great identity to the proposition involved in this appeal came up.

In the Coyne case the defendant there was charged with perjury. The defendant during the course of the trial introduced evidence of paresis or partial paralysis affecting his muscular motion, due to a disorder of his central nervous system and that this had so affected his memory that he was known in ordinary transaction of business to forget one day what had occurred the day before or the week before. At the conclusion of the trial the Court instructed the jury as follows:

> "You are instructed that all testimony introduced by the defense for the purpose of showing total or partial insanity of the defendant on October 28, 1907 will be disregarded by you, for the reason that such testimony is insufficient to establish such defense."

The Supreme Court, in holding that giving of such an instruction was in error, went on to say:

> "We think that the court, in ascribing the offer of this evidence to an attempt to prove insanity, either total or partial, misapprehended the purpose of the evidence, and that its instruction in withdrawing it, on that ground, from the jury, was

erroneous. The whole purpose of the testimony, as we view it, was to place the jury in possession of the condition of the defendant's mind at the time of the alleged perjury, and to allow them to say whether the statements of the defendant before the grand jury, that he did not believe or did not recall his statements to Ascher and others, were honest or not, and, if they were honest, then he had not committed perjury. It is not for us to credit or discredit this statement, in view of all the testimony in the case, but it was a question of fact, for the jury to determine. Our conclusion is that the court committed error in excluding this testimony from the jury by its instruction.

Earlier in its opinion this court declared:

"The purpose of the testimony offered, and excluded by the court, was not to establish that the defendant was insane, but that, owing to disease and nervous disturbances, he had evinced a great loss of memory up to April, 1907. *This testimony was not for the purpose of showing that he was either wholly or partially unable to appreciate the moral or physical consequences of an act, but to show that his memory was wholly unreliable*; and this not by himself, but by other witnesses who had occasion to observe his conduct independent of this charge. We cannot see any reason why it was not competent for the defendant to introduce this testimony as tending to show the jury that, notwithstanding they might believe, beyond all doubt, that he did in fact solicit employment from Ascher and others to aid them in getting their ordinances through, still that, owing to this

failure of memory, he did not recall and did not remember, at the time, these propositions to Asher and others. The indictment and the plea of not guilty tendered the issue to the jury whether the defendant honestly believed, as he stated, or whether honestly he did not recall those visits to Asher and others. "Memory," says Sir William Hamilton, "is the power of retaining knowledge in the mind; the mental power of recognizing past knowledge." That men may do and do have what is denominated unsound memories, although otherwise of sound mind, is a matter of common knowledge. It is most generally observable in persons of old age, who have lost the power to remember past events; but no one would class them as insane persons. That such a person might do an act and be perfectly conscious of it, and of its moral and legal effect, and yet forget it, we take it is not open to dispute. Of course, it would be for the jury to credit or discredit this testimony and believe or not believe it, as it appeared reasonable or unreasonable to them; but the question here is one of competency." (Emphasis App.)

In the case of Leaptrot vs. State, 40 Southern Reporter 616, the defendant there was indicted for perjury. The perjury consisted of false answer given on voir dire examination when called as a juror in a murder case. On the trial for perjury the defendant adduced evidence on his behalf that he was not sound mentally or mentally responsible by the opinion of an ordinary witness. The prosecutor objected to the introduction of this testimony and the

trial court sustained the objection. The Supreme Court of Florida in its decision on reversing the Leaptrot case declared:

> "When we consider that in this case the charge was perjury committed by the defendant "knowingly, falsely, corruptly, willfully, and wickedly," it seems to us that the mental condition of the defendant at the time the alleged false oath was taken, and his physical condition as bearing on the mental, including his powers of memory, were proper subjects of investigation on his trial. It was not necessarily a question of his sanity or insanity. A man may be sane, and yet, by reason of illness or other cause, have a very defective memory." (Emphasis Appellant's)

In the opinion the Court quotes from an old recognized authority on the subject of criminal law:

> "In 2 Bishop's Criminal Law, § 1045, Hawkins is quoted as follows: 'It seemeth that no one ought to be found guilty (of this offense) without clear proof that the false oath alleged against him was taken with some degree of deliberation. For if, upon the whole circumstances of the case, it shall appear probable that it was owing rather to weakness than perverseness of the party, as where it was occasioned by surprise, or inadvertency, or a mistake of the true state of the question, it cannot but be hard to make it amount to voluntary and corrupt perjury, which is of all crimes whatsoever, the most infamous and detestable.' In section 1046, Id., it is said: 'Perjury is committed only where there is the intent to testify falsely.'" (Emphasis Appellant's)

In the case of People vs. Dody, 64 Northeastern Reporter 807 at page 810, the appellate court ruled that the question as to the truth or falsehood of the defense in a perjury case that the defendant at the time he gave such alleged perjurious testimony had been suffering from paresis, which paralyzed his memory, is a question of fact for the jury. The Court of Appeals of New York in its opinion observed:

> "The real defense interposed in behalf of the defendant to the charge of willful and corrupt perjury, and which occupies such a prominent place in the record, was that, at the time when the testimony was given now charged to be false, he was, and had for some time been, suffering from paresis, or some similar mental disease, that paralyzed his memory to such an extent that he could not be held responsible for his answers to the questions propounded to him upon the trial. It is not necessary in this court to say much in regard to that defense. It is quite sufficient to observe that it presented a question of fact that was fully and fairly tried before the jury. The evidence bearing upon it consisting in part of the opinions of experts, was submitted to the jury, and the verdict must be regarded as the fair and deliberate judgment of the body which, under our system of jurisprudence, is organized to determine matters of fact, that it was without merit. Of course, it is possible that a person may be suddenly afflicted with a mental disease that completely prostrates all of his intellectual faculties, but whether that claim was true or false in this case was a question for the jury."
> (Emphasis Appellant's)

The above cited and quoted from cases indicate the principle of common law controlling the question at hand and manner in which that principle has been interpreted by the Courts of the United States in the light of reason and experience.

It establishes beyond a shadow of a doubt the evidence offered at the trial on behalf of appellant was competent and should have been admitted by the trial court.

SECOND ASSIGNMENT OF ERROR

THE TRIAL COURT WAS IN ERROR IN REFUSING THE APPELLANT THE OPPORTUNITY TO MAKE AN OFFER OF PROOF AFTER SUSTAINING THE GOVERNMENT'S GENERAL OBJECTION TO A QUESTION SEEKING TO ELICIT COMPETENT, RELEVANT AND MATERIAL EVIDENCE.

The Court refused to permit the appellant's counsel to make an offer of proof after the Court had sustained the government's objection to a question embracing the subject of appellant's mental illness, (See Tr. of Rec. page 169).

This Honorable Court has previously held that a trial judge is never justified in refusing a defendant the opportunity to make an offer of proof except where every conceivable answer to the question would be inadmissible, D-Aquino vs. U. S. (9th Cir.) 192 Fed (2) 338.

The error complained of in this second assignment is so interlaced with the first assignment that argument would of necessity be repetitious. Appellant is constrained

to submit this proposition without further worrying the point.

CONCLUSION

The prejudicial aspect of the rulings of the trial court are apparent. The trial court by sustaining the government's objection to the question seeking to elicit evidence of mental illness shut off all proof on a phase of the issue as to whether appellant entertained an honest though erroneous belief in the truth of his testimony at the time he gave it. If the appellant could have convinced the jury he honestly believed he was testifying truthfully at the time in question, he was entitled to an acquittal. As the authorities all relate evidence of mental illness is competent on the subject of honest belief. The refusal of the right to adduce evidence on this subject constituted reversible error. The error stands magnified in the light of the circumstance that after several hours of deliberation the jury notified the Court in writing that it was then impossible for them to reach an agreement on the question of appellant's guilt on any of the five counts which they were then considering. (See Tr. of Rec. page 31).

The principle where the facts of the case are such that the appellate court cannot say that if the evidence erroneously excluded had been admitted, the jury would have returned the same verdict, the exclusion of such evidence

should be held to be reversible error. (Crawford vs. U. S. 212 U.S. 183.) has full application in your appellant's case.

Appellant, for the reasons set forth in this brief, respectfully requests this Honorable Court grant reversal.

Respectfully submitted,

CANTILLON & CANTILLON

Attorneys for Appellant